IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM 1979

No. 78-6276

- -X

VINCENT VIDAL, :

Petitioner, :

v. :

PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

and

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND NEW YORK COURT OF APPEALS

BERNARD G. EHRLICH

CHARLES SUTTON
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

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PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

Motion for Leave to
Proceed In Forma Pauperis

Please Take Notice that upon the affidavit of Vincent Vidal, sworn to February 25, 1979 and the affidavit of Charles Sutton, sworn to February 25, 1979, the undersigned will move this Court for leave to proceed in forma pauperis pursuant to Supreme Court Rules, Rule 53 and 28 U.S.C. Section 1915 authorizing Charles Sutton, Esq. to represent the petitioner without charge or claim against the United States for legal fees, and granting petitioner such other and further relief as may be just and proper.

Dated: New York, New York
February 25, 1979

Charles Sutton
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

To: Clerk, Supreme Court
of the United States

To: New York State
Attorney General

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

Petitioner, :

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- -X

State of New York)
) SS.:
County of Westchester)

Vincent Vidal, being duly sworn, deposes and says:

1. I am the petitioner and I make this affidavit in support of my motion for leave to proceed in forma pauperis on my petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department and to the New York Court of Appeals.

2. I was indicted by two indictments from the Supreme Court of the State of New York, County of Kings, indictments number 7824/73 and 7826/73 with alleged sale of cocaine and possession of cocaine, upon which judgments of conviction after trial by jury were rendered on January 22, 1975, sentencing me to a mandatory jail term of fifteen years to life. I have been confined to jail since November 1, 1974.

prior to my confinement to jail, I was employed as a longshoreman for over fifteen (15) years. I had never before been arrested or convicted of any crime.

3. I own no assets of any kind. I have no bank accounts, no stock holdings, no real estate and no property of any kind, and no income, except what small amounts of money I might be able to earn while working in jail. I am presently confined at the Greenhaven Correctional Institution of the New York State Department of Correction at Stormville, New York.

4. I was unable to pay either for legal fees or costs of transcripts or other expenses on my appeal to the New York State Supreme Court, Appellate Division, Second Department. As a result thereof, upon the application to that court, I was allowed to appeal in forma pauperis by order of that court dated and filed June 23, 1975, a copy of which is attached hereto.

5. I am unable to pay the costs to proceed in the prosecution of my petition for a writ of certiorari to the New York State Supreme Court, Appellate Division and New York Court of Appeals.

6. My attorney Charles Sutton, Esq. has agreed to represent me in this Court without a present payment of a

legal fee upon the understanding that I would pay him when I am able, which I agree to do, and without any expense to the United States. He has represented me on the trial of these indictments, upon my appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, upon my application for leave to reargue the appeal to that court, and upon my application to Hon. Jacob D. Fuchsberg, Associate Judge of the New York Court of Appeals for leave to appeal to that court from the order of the said Appellate Division affirming the judgment of conviction.

7. No previous application has been made to this Court for this relief.

8. As shown by my attached Petition for a Writ of Certiorari, my appeal is meritorious and presents important constitutional questions which the State court has decided in conflict with applicable decisions of this Court, (Petition, Points I, II) and in addition, presents an important question of federal law which has not been determined by this Court (Petition, Points III-IX).

Vincent Vidal
Vincent Vidal

Sworn to before me this
25th day of February, 1979

Notary Public, State of New York
FRANCIS B. McDONNELL
Notary Public, State of New York
Qualified in Dutchess County
Commission expires March 30, 19[illegible]

SUPREME COURT OF THE UNITED STATES

- -X

VINCENT VIDAL, :

Petitioner, :

v. :

PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

State of New York)
) SS.:
County of New York)

Charles Sutton, being duly sworn, deposes and says:

1. I am the attorney for the petitioner and I am familiar with the facts herein.

2. I agree to represent the petitioner in proceedings in this Court and to prosecute the proceedings of the petitioner in this Court without present payment of any legal fee by the petitioner and I agree to be paid by the petitioner when he is able to pay me. I agree not to apply to or seek payment from the United States on account of any legal fee in any proceedings in this Court on behalf of this petitioner.

3. I am familiar with the Rules of this Court. I have not yet applied for admission to become a member of the Bar of this Court, although I am able and qualified to do so, and shall do so as promptly as feasible.

4. The petitioner has been confined to jail since on or about November 1, 1974.

Charles Sutton

Sworn to before me this
25th day of February, 1979

Notary Public, State of New York

No. 41-0133[illegible]

Notary Public
No. 41-0133[illegible]

IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM 1979

No._____

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND NEW YORK COURT OF APPEALS

BERNARD G. EHRLICH

CHARLES SUTTON
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

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IN THE UNITED STATES
SUPREME COURT

OCTOBER TERM, 1979

NO._____

- -X

VINCENT VIDAL, :

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT AND THE NEW YORK COURT OF APPEALS

TO: The Honorable Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Vincent Vidal, by Charles Sutton, his attorney, respectfully petitions for a writ of certiorari to the New York State Supreme Court, Appellate Division, Second Department and the New York Court of Appeals upon the grounds set forth below.

Statement Pursuant to
U.S. Supreme Court
Rule 23, 28 U.S.C.A.

1(a) The decision, opinion and order of the New York Supreme Court Appellate Division, Second Department, dated February 21, 1978, was reported at 61 A.D. 2d 825. A copy of the order and opinion of that court dated and entered February 21, 1978 is appended at pages 1a and 2a. A copy of the order dated and entered June 26, 1978 of that court, which denied the petitioner's motion to restore the appeal to the appeal calendar for argument on the ground that the court did not afford the petitioner his fundamental right to appeal to that Court since that Court did not have before it 1,500 pages, or almost one-half of the trial transcript, which were omitted from the record on appeal delivered to the Appellate Division by the Supreme Court, Kings County Appeals Bureau, and upon which incomplete record that Court rendered its review on appeal and its decision on appeal was not Reported, and a copy thereof is appended at page 3a. The decision, opinion, and order of Honorable Jacob D. Fuchsberg, Associate Judge of the New York Court of Appeals, dated and entered November 27, 1978 which denied the petitioner leave to appeal to that court from the said Appellate Division orders is not yet reported unofficially at _____ N.Y.S. 2d _____ and officially at _____ N.Y. 2d _____, and is appended at page 4a.

1(b) (i) The orders sought to be reviewed are the orders of the said Appellate Division entered February 21, 1978 and June 26, 1978.

(ii) The order respecting a rehearing (which was not opposed by the District Attorney) was the said order dated and entered June 26, 1978. The time within which to file this petition is calculated from the date of entry of November 27, 1978 of the said order of New York Court of Appeals Associate Judge Jacob D. Fuchsberg.

(iii) The statutory authority believed to confer on this court jurisdiction to review the orders in question by writ of certiorari is 28 U.S.C. Section 1257(3), to wit:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> .....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under

the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

1(c) The questions presented for review are as follows:

(1) Given New York's statutory guarantee to every criminal defendant in all criminal prosecutions of "an absolute and fundamental right to appeal a conviction", and given New York's requirements that a full and complete transcript of the trial be filed with it as constituting the record on appeal on an appeal in forma pauperis, and given New York's requirement that the Appellate Division has the power to review both the facts and the law and to render its review and decision on both grounds, is the petitioner denied his Constitutional rights to due process of law and equal protection of the law upon his appeal to that court in forma pauperis when that Appellate Division renders its decision on the petitioner's criminal appeal without having before it and without reviewing almost 1,500 pages out of a trial transcript of 3,000 pages, being one-half of the trial transcript, on a trial which commenced November 4, 1974 and ended December 4, 1974 and in which the missing trial transcript pages included the testimony by a majority of the witnesses produced at trial and included the majority of the admissions of the evidence presented at trial which was vigorously contested and in which

at least thirty appellate points of error were presented in petitioner's brief to that court?

(a) Was the petitioner's Constitutional right to appeal violated by the refusal of the trial court to make a record of the tape recording between the undercover police officer and alleged accomplice Rosario Barbarino which were played to the jury and as to which no minutes or reconstruction thereof was made for inclusion in the trial record or in the record on appeal?

(2) Were the petitioner's Constitutional rights under the Fourteenth, Fourth and Fifth Amendments violated by the police when they broke into the petitioner's private apartment without a warrant, without announcing their purpose, without exigent circumstances allegedly to arrest a person named Rosario Barbarino who did not reside at petitioner's apartment, whose residence address the police knew to be elsewhere than the petitioner's apartment, without probable cause to believe that the said Rosario Barbarino was then inside the petitioner's apartment, in the face of police evidence that the police at that time knew that Rosario Barbarino was not inside the petitioner's apartment, and the police testimony that after they entered they did not find Rosario Barbarino to be in the petitioner's apartment, which forcible entry into petitioner's apartment occurred following the use by police of their drawn guns and police badges to force a tenant

of the building who was in the outer lobby to use his key to open the locked inner lobby door for the police and from there, the police proceeded up the stairs to petitioner's apartment, where the police after such entry seized and handcuffed petitioner at the vestibule of the apartment, and thereupon entered the petitioner's apartment and searched the same, and allegedly seized items upon which the petitioner was indicted and convicted of possession of narcotic drugs and paraphernalia, which evidence was also used to prejudice petitioner in his trial?

(3) Were the petitioner's Constitutional rights to due process of law and to a fair trial violated by the knowing elicitation and use by the prosecution from Rosario Barbarino, the alleged accomplice of petitioner, that in return for his testimony the District Attorney had promised him a jail sentence of eight years to life, when in fact the promise was for life probation, which the District Attorney recommended shortly after the end of this trial, and Rosario Barbarino was sentenced to lifetime probation?

(4) Was the petitioner's Constitutional rights under the Fifth Amendment violated by the statement by the prosecutor, over objection that "If for a minute there was any doubt whether this stuff is cocaine --- He could have produced his own chemist"?

(5) Was the petitioner's Constitutional right to due process of law and a fair trial violated by the trial court's prejudicial conduct including siding with and counselling the prosecution?

(6) Was the petitioner's Constitutional rights under the Fifth and Sixth Amendments violated when the trial court charged the petitioner with the crime(s) of conspiracy and acting in concert which were not charged or alleged in the indictment(s) and allowed the prosecution to introduce inadmissible hearsay thereunder?

1(d) The Constitutional provisions, statutes and Rules of Court are set forth at length and appended at pp. 5a-9a, to wit: U.S. Constitution: Fourth, Fifth and Sixth Amendments (pp. 5a); New York Criminal Procedure Law Sections 450.10; 460.70(1); 470.05; 470.15; 470.20; 470.50(1) (pp. 5a-9a).

Statement of the Case and Facts

The defendant Vincent Vidal was charged by two separate indictments, 7824/73 and 7826/73, Kings County Supreme Court, which were consolidated for trial over objections.

Indictment Number 7824/73 contained six counts. The first count charged defendant with the sale of a controlled substance in the first degree (alleged cocaine) on November 20,

1973, by the Fourth Count with sale of a controlled substance in the third degree (alleged cocaine) on November 8, 1973. The Second and Third Counts charged defendant, respectively, with possession with intent to sell, and possession of the alleged cocaine charged in the First Count. The Fifth and Sixth Counts charged defendant with possession with intent to sell and possession of the alleged cocaine charged in the Fourth Count.

Indictment Number 7826/73 charged defendant by the First Count with sale of cocaine in the First Degree committed on December 27, 1973. The Second and Third Counts charged possession with intent to sell and possession, based on the sale count. Counts 4, 5, 6, 7, 8, 9, 10 and 13, charged possession of almost every controlled substance allegedly seized in defendant's apartment, to wit, 4 - cocaine (by aggregating small amounts of white powder found in the apartment); 5 - opium; 6 - amphetamine; 7 - methaqualone; 8 - barbiturates; 9 - marijuana (also by aggregation); 10 - "materials suitable for packaging ... narcotics ... or stimulants"; 13 - possession (.22 cal.) revolver; 14 - possession (.38 cal.) revolver; 15 - possession stolen (.38 cal.) revolver. Count 15 was dismissed on motion.

The defendant was convicted after trial by jury on all counts except the one dismissed count, as above. The defendant was sentenced on January 22, 1975 on each of two sale

counts and two possession counts to a term of 15 years to life in jail, to run concurrently. The schedule of his sentences on the consolidated indictments is set forth as follows (all sentences were to run concurrently):

Consolidated Indictment Counts	7824/73 Indictment Counts	Charge	Sentence
1	4	Sale cocaine, third degree, November 8, 1973.	1 yr. to life.
2	5	Possessing cocaine with intent to sell.	1 yr. to life.
3	6	Possession cocaine.	Dismissed.
4	1	Sale cocaine first degree, November 20, 1973.	15 yrs. to life.
5	2	Possession cocaine with intent to sell.	Dismissed.
6	3	Possession cocaine.	Dismissed.
	7826/73 Indictment Counts		
7	1	Sale cocaine, first degree, December 27, 1973.	15 yrs. to life.
8	2	Possession cocaine, with intent to sell, December 27, 1973.	Dismissed.
9	3	Possession cocaine, December 27, 1973.	15 yrs. to life.
10	4	Possession cocaine, December 27, 1973.	15 yrs. to life.
11	5	Possession opium, December 27, 1973.	1 year.

Consolidated Indictment Counts	7826/73 Indictment Counts	Charge	Sentence
12	6	Possession, amphetamine, December 27, 1973.	1 year.
13	7	Possession, Methaqualone, December 27, 1973.	1 year.
14	8	Possession barbiturates, December 27, 1973.	1 year.
15	9	Possession marijuana, December 27, 1973.	Max. 3 years.
16	10	Possession materials, December 27, 1973.	1 year.
17	13	Possession (.22 cal.) Revolver, December 27, 1973.	1 year.
18	14	Possession (.38 cal.) revolver.	1 year.
19	15	Possession (.38 cal.) stolen revolver, December 27, 1973.	Dismissed.

The defendant has been confined to jail since November 4, 1974 upon the commencement of the jury trial. The jury verdict was rendered on December 4, 1974.

The defendant timely filed his notice of appeal from the judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department.

Thereafter the defendant applied by motion to the Appellate Division for leave to appeal in forma pauperis. That

motion was granted by order entered June 23, 1975, a copy of which is appended at page a-____, which directed that "Pursuant to statute (CPL 460.70) within the twenty day period prescribed therein, the stenographer of the trial court is required to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the hearing, trial, and sentence and the clerk of the trial court shall furnish one such certified transcript to appellant, without charge." On November 2, 1977 the defendant's brief was filed with the Appellate Division without a notice of argument and without a note of issue. Thereafter a calendar was published in the New York Law Journal showing that the case was scheduled for argument for February 6, 1978. The defendant's counsel was actually on trial in a criminal case from January 3, 1978 to March 8, 1978. As a result the appeal was marked submitted without oral argument. The Appellate Division rendered its decision and order entered on February 21, 1978 affirming the judgment of conviction.

Following that order by the Appellate Division entered February 21, 1978, defendant's counsel discovered that the Appellate Division had not had a complete transcript of the trial upon which its appellate review was rendered. Pursuant to New York Criminal Procedure Law Section 460.70, and the aforesaid order of the Appellate Division entered June 23, 1975, the Kings County Supreme Court Appeals Bureau was required

to furnish the Appellate Division with a complete trial transcript which would be part of the record on appeal. The total number of pages of the trial transcript was approximately 3,000 pages. People v. Curro, 25 N.Y. 2d 44 (1969). The trial transcript for pages "1,200 (1,500) to 3,213/1" however was not presented or delivered to the Appellate Division. The trial transcript beginning from page 1 to the end was apparently presented in one volume and gave the appearance of completeness. However, the pages "1,200 (1,500) to 3,213/1" in fact were omitted. An investigation by the Appeals Bureau clerk confirmed the fact that almost one-half of the trial transcript had not been before the Appellate Division on the appeal. Within the time allowed by statute, a motion for reargument dated March 23, 1978 was duly filed which presented these facts to the Appellate Division, asserting that the defendant "be accorded his statutory and constitutional right to have a review on appeal from the judgment herein upon a complete record" as set forth in the affirmation of Charles Sutton dated April 27, 1978. The District Attorney did not oppose the motion. Notwithstanding that the District Attorney did not oppose the motion the Appellate Division denied the motion by its order entered June 26, 1978 appended at page a_____.

The trial transcript which was filed by the said Appeals Bureau with the Appellate Division was deficient to

the extent of almost 1,500 pages out of a total of 3,000 pages. The trial period missing transcript was from November 18, 1974 to November 29, 1974. The trial commenced November 4, 1974 and continued until December 4, 1974 when the jury rendered its verdict. Those pages which were missing from the Appellate Division record on appeal included the testimony of undercover police officer Florio, police Sergeant Toal, police officer Kennedy and all three of the police chemists, Acevedo, Agatow and Ferrar, whose testimony concerned each of the three counts of sale of alleged cocaine. The competence and the test procedures allegedly employed by each police chemist to "identify" "white powder" as "cocaine" waschallenged and impeached. The trial transcript of their testimony showed that the evidence was insufficient as to each sale count to authorize a guilty verdict. Numerous objections to the introduction of evidence was included in the missing pages. There was no way an appellate court could review the trial without those 1,500 missing pages. As shown by the copy of the Index to petitioner's brief to the Appellate Division, appended at pp. a_____, the issues presented were substantial and critical issues of fact and of law which could not be resolved without a review of the trial transcript.

POINT I

The indigent petitioner was denied his fundamental right to have his conviction reviewed on appeal by the Appellate Division.

New York Criminal Procedure Law Section 450.10 grants every defendant "following a judgment sentence and order of a criminal court" a right to appeal.

> "In New York State, every defendant has an absolute and 'fundamental right' to appeal a conviction (People v. Montgomery, 24 N.Y. 2d 130, 132, 299 N.Y.S. 2d 156, 159, 247 N.E. 2d 130, 132, supra; see, also, CPL 450.10). The denial of that right constitutes as much a failure of due process as would the denial of the right to a trial itself, and, where its denial or serious obstruction comes about because of poverty, it constitutes a denial of equal protection as well (Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L.Ed. 891; People v. Montgomery, supra, p. 134, 299 N.Y.S. 2d, p. 161, 247 N.E. 2d p. 133)."

People v. Rivera, 39 N.Y. 2d 519, 522 (1976); People v. Melton, 35 N.Y. 2d 327, 329 (1974). In order to give substance to that "absolute and fundamental right to appeal a conviction",

People v. Rivera, supra, a stenographic transcript of the trial, absent circumstances not applicable here, is essential in order ' for a reviewing court to provide the review of a conviction that a defendant is entitled to receive.' People v. Rivera, supra. "The right to appeal requires a review of the merits upon an appeal" and that requires the reviewing court to review the trial transcript on the merits. People v. Borum, 8 N.Y. 2d 177 (1960). "There can be no doubt that a criminal appellant is entitled to a 'record of sufficient completeness' (CPL 460.70, subd. 3; Code Crim. Proc. Section 485; Mayer v. City of Chicago, 404 U.S. 189, 193-195, 92 S. Ct. 410, 30 L. Ed. 2d 372; People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323, 147 N.E. 2d 719, 720." People v. Hall, 32 N.Y. 2d 546, 551 (1973); Draper v. Washington, 372 U.S. 487, 497, 499 (1963). Without a complete transcript of the trial testimony, there can be no valid review by the appellate court. People v. Pride, 3 N.Y. 2d 545, 549-550 (1958); People v. Giles, 152 N.Y. 136, 139 (1897); People v. Hartley, 34 A.D. 2d 733 (4th Dept. 1970); People v. Schwack, 16 A.D. 2d 879 (4th Dept. 1962); People v. Hines, 57 App. Div. 419 (1st Dept. 1901); People v. Williams, 13 A.D. 2d 814 (2d Dept. 1961); People v. De Mayo, 2 A.D. 2d 985 (2d Dept. 1956); People v. Eldridge, 34 A.D. 2d 693 (3rd Dept. 1970); People v. Cittrola, 210 N.Y.S. 21 (App. Div. 1st Dept. 1925); People v. Adams, 22 A.D. 2d 892 (2d Dept. 1964).

In view of the fact that the indigent petitioner's forma pauperis appeal to the Appellate Division required a complete trial transcript for appellate review, an appellate review based only on approximately one-half of the trial transcript denied the petitioner his Constitutional rights to due process of law and equal protection of the law to have a full review of his appeal on the merits as available to all defendants. Mayer v. City of Chicago, 404 U.S. 189, 193-195 (1971); Draper v. Washington, 372 U.S. 487, 488-489, 493-500 (1963).

POINT II

The defendant was denied his Constitutional rights to due process of law and to a fair trial by the knowing use by the prosecution of false and perjured testimony.

The prosecution elicited false and perjured testimony by Rosario Barbarino that the promise made to him for his testimony by the District Attorney was a jail sentence of a minimum of eight (8) years to life (1743, 1942-43)(12-2-74; 195-199) when, in fact, the promise made was for lifetime probation

The false testimony denied the defendant his Constitutional rights to due process of law and to a fair trial and require that the judgment of conviction must be reversed. Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); People v. Savvides, 1 N.Y. 2d 554, 557 (1957); People v. Mangi, 10 N.Y. 2d 86 (1961); People v. Zimmerman, 10 N.Y. 2d 430 (1962); People v. York, _____ A.D. 2d _____, 396 N.Y.S. 2d 956 (4th Dept. 1977).

Each alleged sale and possession counts against the defendant for the dates November 18, 1973, November 20, 1973 and December 27, 1973 depended essentially upon the testimony of Rosario Barbarino. His credibility was an important issue in this case.

On the direct, the prosecution asked Barbarino to state the promises which were made to him if he cooperated and testified in this matter (1743). Barbarino testified that he had been promised a jail sentence of "eight years to life" (1743).

"Q. And in return for your testimony in this case have any promises been made to you?

A. Yes.

Q. What promise was made to you?

A. I was promised that if I cooperate and testify in this matter my sentence would be eight to life.

Q. Eight years to life?

A. Yes.

Q. Do you know what minimum sentence you face without such a recommendation?

A. Minimum of fifteen to life." (1743)

On cross-examination, the defense questioned Rosario Barbarino as to this promise made to him by the prosecution (1942-1943):

"Q. Mr. Barbarino, are you aware, Mr. Barbarino, that the sale of any quantity of some controlled drugs can result in a life sentence?

Mr. Farkas: Objection, Your Honor. It is irrelevant.

The Court: Overruled.

A. Yes.

Q. Are you charged by indictment with crimes alleging sales of controlled substances under which you can get a life sentence?

A. Yes.

Q. As a matter of fact, you are charged with a number of them, are you not?

A. Yes.

Q. And does it weigh on your mind that you could be sentenced to any life sentence at all?

A. Yes.

Q. And it bothers you greatly?

A. Yes.

Q. You are afraid of going to jail for a lifetime, are you not?

Mr. Farkas: Objection, Your Honor. It is an improper question 'going to jail for a lifetime'.

The Court: Sustained in that form.

Q. Are you afraid to be sentenced to life imprisonment?

Mr. Farkas: Objection, Your Honor. He is already sentenced. He is getting sentenced to life imprisonment.

The Court: I'll permit it. Overruled.

A. Yes, I'm scared.

Q. And you made a deal by reason of that fear with Mr. Farkas, did you not?

A. Yes.

Q. Do you know the full extent of the deal that your attorney made with Mr. Farkas?

A. No.

Q. But as far as you are concerned, you are getting alleviated from the penalties that you would have had by reason of the indictment facing you, isn't that true?

A. Yes." (1942-43) (Underscoring added).

The prosecutor, on summation, falsely declared to the jury (12-2-74: 195-6; 198-199) that Rosario Barbarino

"is going to pay for it dearly. He is up against the wall and everybody knows that. I am not an ostrich. I am not going to hide my head and say he is wonderful. I wanted you to see who he is. (196-7)... Now com(ing) here may be the first decent thing he ever did in his life. And even that he did with a sword hanging over his head. He had a motive to lie...

You heard the promise that was made to him. He got about seven years off his Brooklyn sentence and he is going to do time, hard time. He spoke to you about a life sentence. That doesn't mean he is going to spend the rest of his life in jail. He is going to do some time and then he will be on parole..." (198-199, 12/2/74) (Underscoring added).

The facts known to the prosecution at the time of the trial and at the time of the testimony of Rosario Barbarino were that the actual promises made to Rosario Barbarino by the prosecution, by the authorized Assistant District Attorneys, were that

Rosario Barbarino would not be sentenced to any jail term whatever, and that he would be sentenced to lifetime probation

These facts were known to the prosecution since January, 1974, ten (10) months prior to the commencement of this trial, and almost eleven (11) months prior to the time when Rosario Barbarino testified on November 19, 1974 in this trial (1741), as shown by the deposition of Henry M. Gargano, Esq., taken on August 4, 1977 and sworn to August 18, 1977.

, and the affirmation of Assistant District Attorney Arnold Taub, sworn to January 27, 1975

Assistant District Attorney Arnold Taub confirmed in his affirmation dated January 27, 1975 , that Barbarino "surrendered" on December 28, 1973 and that

> "Immediately upon his surrender defendant (Barbarino) agreed to cooperate with the Police Department by giving information regarding trafficking in drugs. He has continued to do so to date and will continue subsequent to the plea..."

A.D.A. Taub also confirmed the life probation plea bargain in his said affirmation:

> "pursuant to Section 65.00(1)(b) and 65.00(3)(a)(ii) of the Penal Law, the People recommend that the above named defendant (Barbarino) be sentenced to life probation upon his plea of guilty to Criminal possession of a controlled substance in the Third degree, a Class A-III Felony..."

The false testimony seriously prejudiced the defendant in the defense of these serious charges. This witness Barbarino testified that he has lied in his life (1943) and that it did not bother him to lie (1943, 1944). He testified that he was "scared" of being sentenced to life imprisonment (1943), and that he would

do whatever he could to get himself out from under (1943). On the other hand, a prison sentence of eight (8) years to life, while it is a lesser sentence in terms of a minimum sentence, is nonetheless a substantial and heavy prison sentence. The normal reaction of a juror would be that Barbarino does not have a sufficient reason to fabricate his testimony or to tailor his testimony to suit the benefit of the prosecution and curry its favor.

The issue of the promise made by the District Attorney to Barbarino in exchange for his testimony was presented to the jury as a very important matter at the time that the jury was being selected (439, 464, 465, 580-584). The prosecutor went to great lengths to condition the jurors into accepting Barbarino's testimony at face value notwithstanding the fact that he was testifying as a result of promises made by the District Attorney's office because "he's got a lot to lose" (439). He argued to the jury that Barbarino was testifying not to aid himself, but simply to tell the "facts". (439-442, 464-465, 610, 485-486, 492-493, 532, 534, 537, 566, 573, 580-584, 594-595, 597-598, 619-620, 625-627, 636-638). The prosecutor made it an important part of the jury selection process to personally assure the jury that Rosario Barbarino would tell them the truth as to what promise was made to Barbarino for his testimony. He conditioned the jurors to accept Barbarino's testimony as truthful because Barbarino would be truthful about the promise made to him by the District Attorney and about the plea bargain under which he would give his testimony. The prosecutor assured the jury "I'm not hiding anything from you" (439), to wit:

"Mr. Parkas: And now I'd like to ask you about the other side - the co-defendant Rosario Barbarino coming to testify and I'm not hiding anything from you and I'm telling you and every other member of the jury that he was made promises and the judge will tell you after very carefully analyzing the testimony because he's got reasons to lie if that's what he's going to do; he's got a lot to lose too. I'm not an ostrich; I'm not going to hide my head, but are you still willing to listen to him despite all of that?" (439) (Underscoring added).

The prosecutor assured the prospective jurors that Barbarino would tell them the truth as to what the promise was:

"Mr. Parkas: Now you are going to hear from Rosario Barbarino. Rosario Barbarino was made certain promises in order to have him turn State's evidence. He will tell you what that promise is. I can't tell you...(464) ...

In Return for Rosario Barbarino giving evidence on behalf of the State, he was made certain promises. What those promises were, he'll tell you and he's already been made that promise... I'm also not going into what the promise was but that fact alone, will that be enough for you to dismiss the testimony of Rosario Barbarino at this point?

Mr. Sutton: Objection.

The Court: Sustained.

Mr. Parkas: Would you be willing to listen to Rosario Barbarino and weigh his testimony together with all the other evidence in this case, Mr. Shaw?

Mr. Shaw: Yes. (465) ...

Mr. Parkas: My question to you, sir, that because of the fact that he was made certain promises, would that be enough to reject his testimony?

Mr. Zar: I'd have to hear more evidence to corroborate it." (610).

The importance of the false testimony in the minds of the jurors, and the weight which they would give to Barbarino's testimony is exemplified by one juror's statement that

"I'd like to hear the facts. I'd like to know what he was promised." (479).

This statement may fairly be stated as being the attitude of the other prospective jurors.

The prosecutor misrepresented to the trial court and defense counsel that Barbarino first became an informant "the day of the suppression hearing" (794), when in fact Barbarino had first become an informant on December 28, 1973 and in January, 1974, almost eleven (11) months before the first day of the suppression hearing as the affidavit of Henry M. Gargano, sworn to August 18, 1977 and the affirmation of Arnold Taub dated January 27, 1975 show The prosecutor indicated that same misrepresentation to the jury that his deal was made just "prior to coming here to testify" (1952):

"Q. Prior to coming here to testify, and the so-called deal was offered to you, were you told what effect the deal would have if you lied on the stand?

Mr. Sutton: Objection. May we have a sidebar, Your Honor?

The Court: Sustained. No." (1952)

The prosecutor misrepresented to the trial court and defense counsel the true status of Barbarino upon the prosecutor's motion to consolidate the two indictments numbers 7824/73 and 7826/73:

"Mr. Parkas: Judge, I asked that you decide that for the following reason, I have to know which defendant I am going to trial with. I intend to go with Vidal, Russo and Barbarino. The second indictment (36)..."

The prosecutor stated that he will consent to defendant Russo being severed,

"... in which event, we will be on trial with defendant Barbarino and defendant Vidal ... on all two indictments, three sales (80)."

The prosecutor misrepresented again to the court and defense counsel that he was putting Barbarino on trial for the charges under indictments 7824/73, 7825/73 and 7826/73 (T. 5-6,

11/4/74) and again at T. 7, 11/4/74, and again at T. 15, 11/4/74, and again at T. 68, 11/4/74, when he knew all along that Barbarino would not be tried and that Barbarino had been promised a lifetime probation, had made his plea bargain, and that Barbarino was to be a prosecution witness.

Later after the suppression hearing upon the commencement of the trial, the defense moved

> "to require the People to give me discovery with respect to the prior connection or history or relationship between the defendant Rosario Barbarino and the police.
>
> The Court: I don't know what you're talking about.
>
> Mr. Sutton: I'm talking very specifically. I respectfully suggest that Rosario Barbarino was, in one way or another, a police agent." (722-723).

The issue was clearly presented for the prosecutor to state the truth regarding the plea bargain of and promise made to Rosario Barbarino (723). However, the prosecutor chose not to disclose the true facts, but to conceal the truth, to wit (723):

> "Mr. Farkas: I'm going to state on the record (once), and for all to clear this up. Rosario Barbarino was not in any form of a police agent on November 8, November 20, or December 27, inclusive. He was arrested as a defendant. Now that Rosario Barbarino is agreeing to testify against Vincent Vidal, all of this happened subsequent to December 27. He has agreed to testify against Vincent Vidal, I would say, prior to the motion controverted last week. Prior to that, I had no conversations with Rosario Barbarino nor has any police officer, to my knowledge, had any conversations with Rosario Barbarino concerning his testimony at this trial.
>
> The Court: The application is denied" (723) (Underscoring added).

The United States Supreme Court, in Miller v. Pate, 386 U.S. 1, 7 (1967) held:

> "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Mooney

> v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A.L.R. 406. There has been no deviation from that established principle. Napue v. Illinois, 360 U.S. 264, 3 L.Ed. 2d 1217, 79 S. Ct. 1173; Pyle v. Kansas, 317 U.S. 213, 87 L. Ed. 214, 63 S. Ct. 177; cf. Alcorta v. Texas, 355 U.S. 28, 2 L.Ed. 2d 9, 78 S. Ct. 103. There can be no retreat from that principle."

The principle of law is well established that a conviction obtained by the prosecution through the knowing use of false and perjured testimony cannot be permitted to stand even though the false evidence is not solicited by the prosecution, where no effort was made to correct it after discovery. United States v. Wilkins, 326 F. 2d 135 (2d Cir. 1964); United States v. Morrell, 524 F. 2d 550, 554 (2d Cir. 1975).

Our Court of Appeals, in People v. Savvides, 1 N.Y. 2d 554, 557 (1957):

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter that its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing as it did, a trial that in any real sense could be termed fair."

The judgment should be reversed and the indictment dismissed.

POINT III

The entry by police on December 27, 1973 into the building at 679-48th Street and into defendant's apartment to make a warrantless arrest of Rosario Barbarino was illegal, violated defendant's Constitutional rights and rendered defendant's arrest and the subsequent search and seizure of defendant's person and apartment illegal.

At the suppression hearing held on November 4, 1974,

police officer George Murphy testified that the police entered the building at 679 - 48th Street to go to Apartment 3E to arrest Barbarino was made on December 27, 1973 at approximately 3:25 P.M. (91, 93: November 4, 1974). It is not disputed that the police had no arrest warrant for anyone. Murphy testified that at that time the police had no search warrant for any premises (145).

Police officer Murphy testified that the purpose of the police in entering the building and in entering defendant's apartment was to

"...arrest Rosario Barbarino and any other occupant" (267).

The Court of Appeals in People v. Gallmon, 19 N.Y. 2d 390, 393 (1967) held that

"...the intent and purpose of the policeman prior to entry... controls ... the validity of the entry."

"An officer without an arrest warrant certainly has no more license than an officer with a warrant in seeking entry to effect an arrest. The constitutional safeguard that assures citizens privacy and security of their home unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in cases of entry to arrest a suspect. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385, 390 (1970)." United States v. Phillips, 497 F. 2d 1131, 1135 (9th Cir. 1974); Whiteley v. Warden, ____ U.S.____, 91 S. Ct. 1031 (1971).

CPL Section 140.15(4) authorizes a police officer to enter any premises to effect an arrest only when "he reasonably believes such person to be present". In United States v. Phillips, 497 F. 2d 1131, 1135 (7th Cir. 1974), the federal Court of Appeals stated, citing, United States v. Brown, 467 F. 2d 419, 423 (1972) which cited United States v. Watson, 307 F. Supp. 173 (D.C. 1969):

"...An officer seeking entry in order to effect an arrest cannot accomplish his task if the person he is looking for is not inside. Consequently, absent consent, the officer

cannot enter by any means, breaking or otherwise, unless he has responsible cause to believe the defendant is within.' 307 F. Supp. at 175. ... An agent must have probable cause to believe that the person he is attempting to arrest, with or without a warrant, is in a particular building at the time in question before that agent can legitimately enter the building by ruse or any other means. To hold otherwise is to grant the agent a license to go from house to house employing ruse entries in violation of the right of privacy of the respective occupants. In this case, the agents did not have probable cause to believe that Phillips was in the office building at the time of the raid and therefore the entry and subsequent arrest were invalid and the conviction must be reversed." (Underscoring added).

Murphy testified that the police had no knowledge that Barbarino was in or at 679 - 48th Street, Brooklyn, or at Apartment 3E, when they entered the building (169, 184, 214, 229, 277). Police Officer Murphy testified that no police officers had the apartment 3E, or the building under observation either before or after police officer Florio had allegedly first entered and had allegedly last exited therefrom (168-170). None of the police officers had any knowledge as to who was in that apartment (169, 184, 214, 229, 277). The police on the other hand knew that Rosario Barbarino did not reside in that building (268). Murphy testified that the police had "checked" and that apartment 3E was

"listed in the records of Brooklyn Union Gas Company and Consolidated Edison as belonging to Vincent Vidal"(288-289).

Further, the police knew that Rosario Barbarino resided at 2122-73rd Street (Florio: 1115-16, 1511-12; Toal: 2177-78, 2186, 2281-82, 2431-32; Kennedy: 2463).

Murphy testified that when the police entered apartment 3E, that Barbarino was not there and that none of the police saw him in the apartment (96-97, 229).

The suppression court made the finding that

"police officer Murphy ... spoke to undercover police officer Angelo Florio who told him that he had just purchased cocaine in that apartment ... and that they, at that time, decided to go to the apartment and arrest the perpetrators of the crime..." (285). (Underscoring added).

There was no evidence that the police entered to arrest "the perpetrators". The testimony of police officer Murphy was that the police went in to

"arrest Rosario Barbarino and any other occupant of the apartment" (267). (Underscoring added).

The suppression court's own findings show that the police had no reasonable cause to believe that Barbarino would be found in the apartment, to wit (288):

"I find that the officer had probable cause to enter the apartment to arrest the defendant Vidal (sic) and the defendant Barbarino who he had ample reason to believe might still be in the apartment in view of the short time that had elapsed from the time that the undercover agent saw Mr. Barbarino in the apartment" (288). (Underscoring added).

The court's finding is clearly speculative and conjectural. It is not based on the evidence. It is contrary to the evidence. 'To rely on conjecture is not due process of law by any definition'. Haley v. Ohio, 332 U.S. 596, 615 (1948).

The suppression court's finding that

"the police had probable cause to arrest the defendant Vidal..." (288) (Underscoring added)

is irrelevant.

The Nagra tape recording made by police officer Florio allegedly before, during, and following the alleged "sale of cocaine" between Florio and Rosario Barbarino, allegedly in defendant's apartment showed that Florio told his fellow officers prior to their entry into the building that he did not see the defendant (1571; see also 277).

Murphy gave no testimony that the police entered to arrest the defendant. The finding that the "police had probable cause to arrest the defendant Vidal" is irrelevant to the issue whether the police were authorized to enter the building and to enter Apartment 3E to "arrest Barbarino and any other occupant" (267).

The Supreme Court in Whiteley v. Warden, _____U.S._____, 91 S. Ct. 1031 (1971) held that a warrantless arrest must comply with the same standards as that required to obtain a warrant of arrest. Murphy's testimony that the purpose of the police in entering the building and the apartment was to

"arrest Rosario Barbarino and any other occupant" (267), (underscoring added)

was tailored to meet apparent constitutional and statutory obstacles to that entry and was tailored to the facts that the police knew that Barbarino was not in the building (169, 184, 214, 229, 277) and to cover up the fact that that statement of purpose was a pretext to break into the defendant's apartment and to arrest the defendant, not Barbarino; People v. Gallmon, 19 N.Y. 2d 389, 394-395 (1967); and should not be credited. People v. Parmiter, _____A.D. 2d _____, 390 N.Y.S. 2d 651 (2d Dept. 1977).

In People v. Nieves, 36 N.Y. 2d 396, 398 (1975) a search warrant which included the authority to search

"(a named person) and any other persons occupying said premises..."

was challenged as invalid. The court of Appeals held that the said description in the warrant did not satisfy Fourth Amendment Standards and was "too general". People v. Nieves, 36 N.Y. 2d 396, 400 (1975). Since that description would not satisfy Fourth Amend-

ment standards when it was included in a search warrant, it also does not satisfy Fourth Amendment standards to authorize the arrest or search of "any other persons occupying said premises" without a search warrant. Whiteley v. Warden, ____U.S.____, 91 S. Ct. 1031 (1971).

POINT IV

The warrantless entry into the building at 679 - 48th Street was forcible, was without announcement of purpose or authority, was illegal and all fruits therefrom must be suppressed.

The trial transcript shows that the lobby door entrance to the apartments in the building was locked, that the police, who were all in civilian clothes (141), gained entrance to the building at 679 - 48th Street, Brooklyn, by force of arms, in that, with gun(s) drawn (154) and badges displayed, police officer Florio compelled someone who was in the hallway of that building to take out his key and use it to open up the locked lobby door entrance of the building so that the police would be enabled to, and did, proceed into the building and up to Apartment 3E (1571-1574). Such forcible entry was illegal. United States v. Phillips, 497 497 F. 2d 1131 (9th Cir. 1974); People v. Salazar, ____M.2d____ (N.Y. Co. 1976); People v. Gallmon, 19 N.Y. 2d 389, 392 (1967).

> "An officer without an arrest warrant certainly has no more license than an officer with a warrant in seeking entry to effect an arrest. The constitutional safeguard that assures citizens privacy and security of their home unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in cases of entry to arrest a suspect. Dorman v. United States, 140 U.S. App. D.C. 313, 435 F. 2d 385, 390 (1970)." United States v. Phillips, 497 F. 2d 1131, 1135 (9th Cir. 1974); Whiteley v. Warden, ____U.S. ____, 91 S. Ct. 1031 (1971).

The police entry into the building was made without announcement of purpose and authority and was illegal and the arrest of the defendant, the search of his person and apartment, and the seizures made by police violated defendant's constitutional rights and require the voiding of the arrest and the suppression of all evidence allegedly seized. CPL Section 120.80(4); United States v. Miller, 357 U.S. 301, 306-314 (1957); People v. Gallmon, 19 N.Y. 2d 389, 390 (1967); Sabbath v. United States, 391 U.S. 585 (1968); People v. Floyd, 26 N.Y. 2d 558 (1970); People v. Frank, 35 N.Y. 2d 874 (1974); United States v. Phillips, 497 F. 2d 1131, 1135 (9 Cir. 1974); Dorman v. United States, 435 F. 2d 385, 390 (D.C. Cir. 1970); People v. Griffin, 22 A.D. 2d 957 (2d Dept. 1964).

POINT V

The warrantless forcible entry by the police into defendant's apartment without announcement of purpose violated defendant's constitutional rights and the arrest of defendant, the search of the defendant's person and of his apartment and the alleged seizures therefrom are illegal and must be suppressed.

After the police forcibly entered the building, without notice of purpose or authority to the occupants of the building, as aforesaid, they came up to Apartment 3E (150). Police officer Murphy testified that police officer Florio persistently pounded on the door of Apartment 3E at 679 - 48th Street, Brooklyn (150) and yelled out only:

"Police, Police... (149) ... Open the door ... (150)"

The suppression court found that the police knocked "strongly" (285) and

"announced 'Police, police, open the door' ... and that shortly thereafter the defendant Vincent Vidal opened the door to the apartment and that he was then told that he was under arrest; that the police officers placed handcuffs on the defendant..." (285).

The suppression court did not find that any of the officers had announced their purpose (284-291), and it could not have made such a finding in this record.

The evidence is undisputed that the police gave no notice of purpose to the defendant at Apartment 3E (150), and made no effort to satisfy the statutory requirement of giving notice of their purpose (CPL Section 120.80 (4)). The arrest of the defendant was unlawful and the evidence obtained as a result thereof must be suppressed, and defendant's conviction must be reversed and the indictment dismissed. People v. Floyd, 26 N.Y. 2d 558 (1970); People v. Mills, 31 A.D. 2d 433, aff'd. 26 N.Y. 2d 862 (1970); Miller v. United States, 357 U.S. 301 (1957); People v. Gallmon, 19 N.Y. 2d 389, 390, 395 (1967); People v. Frank, 35 N.Y. 2d 874 (1974); People v. Griffin, 22 A.D. 2d 957 (2d Dept. 1964).

POINT VI

There were no exigent circumstances to justify the warrantless, forcible entry into the building and into the apartment.

The burden of justifying a warrantless forcible entry into a private home is upon the government. United States v. Rosselli, 506 F. 2d 627 (7th Cir. 1974).

The prosecution did not meet its burden to justify the warrantless forcible entry into the building and into defendant's apartment. No evidence was presented by the prosecution of any exigent circumstances. The prosecution made no claim of any exi-

gent circumstances. The prosecution presented no argument of exigent circumstances. The court made no finding of any exigent circumstances (284-291).

"The Circuit Court for the District of Columbia (in Dorman v. United States, 140 U.S. App. D.C. 313, 435 F. 2d 385, 390 (1970)) listed six elements that have to be considered in justifying a warrantless entry to make an arrest: (1) That a grave offense is involved, particularly one that is a crime of violence; (2) That the suspect is reasonably believed to be armed; (3) A clear showing of probable cause to believe that the suspect committed the crime involved; (4) Strong reason to believe that the suspect is in the premises being entered; (5) A likelihood that the suspect will escape if not swiftly apprehended; and (6) The circumstance that the entry, though not consented, is made peaceably." United States v. Phillips, 497 F. 2d 1131, 1135 (7th Cir. 1974).

Under the facts of this case, set forth above, none of the six (6) criteria set down by the federal court to show exigent circumstances existed in this case.

POINT VII

The warrantless arrest of the defendant was made on pretext and violated defendant's constitutional rights.

Under the facts of this case, as set forth above, the true police purpose in forcibly breaking into the building and in forcibly breaking into the defendant's apartment was to arrest the defendant and to conduct a warrantless search of his person and his apartment. As shown above, there were no exigent circumstances. The matter was one plainly requiring only "normal investigative procedures", since defendant was known to the police, who knew where he resided (288-289).

The testimony of police officer Murphy shows that after Police officer Florio had knocked forcefully on the apartment door

and announced "Police, Police, open the door" (148-150), that the defendant Vidal opened the door (96) and the police immediately seized the defendant (96), "very, very fast" (155), at the doorway entrance to the apartment (96-97, 154), handcuffed his hands behind his back (97, 154) and forcibly put to the ground there (154). He was then forcibly taken from the entrance doorway, down the hall, around a right turn, and into the kitchen (189, 190) where the police forced the defendant down upon the kitchen floor there (99). Other officers went immediately from the entrance doorway, down through the foyer, down the hallway, past the kitchen, across the living room and into the bedroom (190-191), and searched the apartment (155-160).

There was no testimony whatever that the police asked defendant "Where is Barbarino?", nor that the police called out for Barbarino. The entry by police was not to arrest Barbarino but to unlawfully search defendant, and his apartment, and to arrest him. See, People v. Jefferson, 43 A.D. 2d 112 (1st Dept. 1973).

POINT VIII

All evidence allegedly seized by the police following the illegal police entry into the building and into defendant's apartment and the illegal arrest and search of the defendant's person and apartment must be suppressed, the counts of the consolidated indictment based thereon must be dismissed, and the judgment of conviction must be reversed.

Counts 4-10 and Counts 13-15 under indictment number 7826/73, which was "consolidated" with indictment number 7824/73, were renumbered by the court (309) to become Counts 10-19 (308,

684-699) under the consolidated indictment. Those counts charged possession of contraband allegedly seized by the police both from the person of defendant and from his apartment following their illegal entry and illegal search at the apartment (684-699). Additional evidence, which the police admitted was seized without any warrant, included money alleged to have been found by police in the kitchen and in the bedroom (179-180, 188-191, 227-229, 679-681), the .38 calibre Smith & Wesson revolver (99, 202, 694, 698) and the small bottle containing white powder (100, 202, 694-696). The .38 calibre revolver was the subject of counts 18 and 19 of the "consolidated" indictment (679-681), and the "small bottle containing white powder" was the subject of count 10 (696).

All of those items must be suppressed, the counts based thereon must be dismissed, the judgment reversed upon the principles set forth in Points II, III, IV, V, and VI.

In addition to the foregoing, all of those items must be suppressed, all of the counts based thereon must be dismissed, and the judgment of conviction of the defendant must be reversed upon the principles of unlawful search and seizure.

> "It is the rule that 'a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of exigent circumstances' (Coolidge v. New Hampshire, 403 U.S. 443, 474-475...) It is readily apparent that there were no exigent circumstances in this case." People v. Stadtmore, 52 A.D. 2d 853, 382 N.Y.S. 2d 807, 809 (2d Dept. 1976). (underscoring added).

The testimony of police officer Murphy shows that after Police officer Florio had knocked forcefully on the apartment door and announced "Police, Police, open the door" (148-150), that the defendant Vidal opened the door (96) and the police immediately

seized the defendant (96) "very, very fast" (155), at the doorway entrance to the apartment (96-97, 154), handcuffed his hands behind his back (97, 154) and forcibly put to the ground there (154). He was then forcibly taken from the entrance doorway, down the hall, around a right turn, and into the kitchen (189, 190) where the police forced the defendant down upon the kitchen floor there (99). Other officers went immediately from the entrance doorway, down through the foyer, down the hallway, past the kitchen, across the living room and into the bedroom (190-191).

Police "seized" without a warrant (201-2) a "revolver" (194-195), "a small container with a spoon attached and a black top containing a white ... powder" (200-202), and U.S. currency (201-202, 179-180, 188-191).

Murphy testified that the police conducted a search of the apartment prior to obtaining the search warrant (155-160).

Murphy testified that immediately after entering the apartment he started looking around the kitchen (157) and he and other officers started looking around the apartment and observing things. (155, 158-161, 207-209, 227-229, 240, 245, 247, 250-258, 259, 261-266). Police opened closet near bathroom (245), top drawer of table in bedroom (240), looked into kitchen cabinet (250-253), among other things. Murphy admitted that he had "observed" items which were in his inventory of the search warrant return before the search warrant was obtained, to wit: item 1, part of item 2, and items 16, 19, 20, and 21 (208). The items he "observed" before the search warrant was obtained, also included "three tin foils containing alleged cocaine, two white tablets, a large bag containing another large bag which contains nineteen

small plastic bags containing alleged marijuana, one tin foil of alleged marijuana, one marijuana cigarette; also included in this is a small paper bag containing two tin foils of vegetable matter and one manila envelope containing marijuana seeds ... a plastic bag containing a small plastic bag containing alleged cocaine, and a tin foil containing alleged cocaine; cup containing two plastic bags and two tin foils containing a white powder alleged to be cocaine, and one small vial containing a white powder, a plastic bottle containing a white powder. That's what I found on the bottom shelf" (263-264); and in addition, other items allegedly in the kitchen cabinet (265-267), also (112-113).

Murphy testified that the police simply went around the apartment making "observations" (155-160). People v. Parmiter, ___A.D.2d___, 390 N.Y.S. 2d 651 (2d Dept. 1977). Even if the police had only conducted an "observation" search, it would nonetheless be a warrantless and illegal search. People v. Howard, 395 N.Y.S. 2d 385 (N.Y. Co. 1977); Congold v. United States, 367 F.2d 1; Hernandez v. United States, 353 F. 2d 624; United States v. Barker, 514 F. 2d 208 (D.C. Cir. 1975).

The record shows that the police had no information at all that there were any drugs, or other contraband at the apartment prior to entering illegally and prior to making an actual rummaging search which they did, that the police had no probable cause to conduct any search, and that the search and seizure was unlawful. People v. Williams, 37 N.Y. 2d 206 (1975); People v. Clements, 37 N.Y. 2d 675, 678-679, 683 (1975); Chimel v. California, 395 U.S. 752 (1969). Even if there had been probable cause to search, it would never, of itself, justify a warrantless search or seizure.

United States v. Lewis, 504 F. 2d 92, 100 (6th Cir. 1974); United States v. Beck, 511 F. 2d 997, 1001 (6th Cir. 1975).

The record also shows that there were no exigent circumstances. Supra, Point V; People v. Clements, 37 N.Y. 2d 675, 678-679 (1975); People v. Abruzzi, 52 A.D. 2d 499, 501-504 (2d Dept. 1976), aff'd. 42 N.Y. 2d 813 (1977).

The search conducted here was a warrantless, illegal, rummaging search far from the actual point of the illegal "arrest" of the defendant, which occurred at the entrance doorway of the apartment (96, 97, 154). People v. Williams, 37 N.Y. 2d 206 (1975); People v. Clements, 37 N.Y. 2d 675, 682-683 (1975); Chimel v. California, 395 U.S. 752 (1969); Coolidge v. New Hampshire, 403 U.S. 443; Vale v. Louisiana, 339 U.S. 30; United States v. Jeffers, 342 U.S. 48; Agnello v. United States, 269 U.S. 20.

POINT IX

The search warrant was issued upon allegations derived from the unlawful entry, unlawful arrest of defendant, and unlawful search and seizure and was invalid.

The affidavit of police officer Murphy does not allege any facts to show the existence of any controlled substances in the defendant's apartment, except to the extent disclosed after the unlawful entry and unlawful search and seizure.

The statements in the affidavit of Murphy in support of the application for a search warrant of alleged prior sales of cocaine on November 8, 1973 and November 20, 1973, do not satisfy the Constitutional and Statutory requirements to show that there was in fact any drugs or other contraband present at the apartment.

People v. Floyd, 26 N.Y. 2d 558, 562 (1970).

There was no probable cause to issue the search warrant except upon the basis of the prior unlawful entry, search, and seizure. See also, 72-85, 11/4/74; 277-284, 11/4/74, as aforesaid.

The search warrant was issued upon allegations derived from the unlawful entry of the police into the building and into the apartment, the illegal arrest of defendant, and the warrantless unlawful search of defendant's apartment by the police. The search warrant was illegal. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919); United States v. One 1973 Lincoln Continental, etc., 391 F. Supp. 1197, 1199-1200 (D.C. Cal. 1975); United States v. Solis, 393 F. Supp. 325 (D.C. Cal. 1975); People v. O'Neil, 11 N.Y. 2d 148, 153 (1962); People v. Grossman, 20 N.Y. 2d 346 (1967); McDonald v. United States, 335 U.S. 451; People v. Williams, 37 N.Y. 2d 266 (1975).

Point X

The trial court denied defendant a fair trial and due process of law by aiding and counselling the prosecutor in the prosecution of the consolidated indictment.

The trial court denied the defendant his fundamental right to a fair trial before a fair, dispassionate, and impartial judge and to due process of law by his repeated conduct in aiding and counselling the prosecutor in the prosecution of the consolidated indictment.

The trial court at a side bar instructed the prosecution witness, the police undercover, as to the testimony that the prosecutor wanted him to give. (800-801). The testimony was illegal hearsay "explanation" by the police undercover for the fact that defendant Vidal was not present at the time and place of the alleged "sale" on December 27, 1973 between former co-defendant Rosario Barbarino to the police undercover of "18 ounces of cocaine" for $18,500.00. The police undercover testified that he did not observe defendant Vidal at the time and place of the alleged "sale". The "explanation" by the police undercover was elicited to this jury through testimony of the illegal hearsay "conversation" between Rosario Barbarino and the police undercover.

This illegal hearsay "conversation" between Rosario

Barbarino and the police undercover was an essential element in the proof against the defendant Vidal to connect him with the "sale" between Barbarino and the police undercover to "explain" his absence. The prosecutor's game plan, which he told the trial court at a side bar conference (791-792) was to have the police undercover testify that he had a "conversation" with Barbarino in which he told Barbarino he did not want to deal with defendant Vidal and therefore that Vidal must have been hiding at the place and time of the sale between Barbarino and the police undercover. This illegal hearsay "conversation" between Barbarino and the police undercover was the "corroboration" for the testimony of Barbarino, a former co-defendant, and an accompliace as a matter of law under CPL 60.22, that defendant Vidal was "hiding" in another room when Barbarino made the "sale" to the police undercover on December 27, 1973. The prosecutor however was having trouble getting the police undercover to testify in accordance with his game play (797-800).

At that point, the trial court called a side bar conference and directed the police undercover, in the presence of the jury, to be present (800):

> "The Court: The objection is sustained. Members of the jury, we're going to have another side bar conference. The witness, Officer Florio is directed to attend.

Side Bar:

The Court: Officer, the District Attorney indicated that there was a conversation between you and Barbarino relating to something that occurred with reference to the sale of November 20 and the fact that no further dealing, that you didn't want to deal further. He also indicated that ---

Mr. Farkas: With Vidal, your honor. Let's get the record straight.

Mr. Sutton: If your Honor please, this is an area where we can no longer coach witnesses.

The Court: I don't think so. I'm telling it to him so that there will be no possibility of error in front of the jury.

Mr. Sutton: That's just the possibility of coaching a witness and I must respectfully object.

The Court: All right, your objection is on the record. It's overruled. ...." (800-801).

Thereafter, the side bar ended and the officer resumed the stand. The trial court overruled the repeated objections to the introduction of the illegal hearsay testimony by the police undercover (801-810). It is notable that when the police undercover testified that he could not recall the date of the conversation (802), the trial court, in the face of that testimony, ordered the police undercover to give a date for that "conversation".

"Q. Officer, after November 20, did you have conversations with Rosario Barbarino?

A. Yes, sir.

Q. And how many conversations have you had?

A. Several, sir.

Q. And in one of those conversations, did you ever discuss Vincent Vidal?

Mr. Sutton: Objection.

The Court: Overruled.

The Witness: Yes, sir.

Q. And what did you say to Mr. Barbarino and what did he say to you?

Mr. Sutton: Objection, Your Honor.

The Court: Fix a --- sustained. Fix an approximate date and time.

Q. The time that you were having --- the conversation that you were referring to, what date was that, if you know?

Q. I don't recall, sir. There were many conversations in between that time.

The Court: Can you fix a time, period, during which the conversation took place?

Mr. Sutton: Been asked and answered, Your Honor.

The Court: What!

Mr. Sutton: It's been asked and answered. He has already testified he can't recall.

The Court: Overruled. Answer the question.

The Witness: In the early part of December, sir.

Q. Can you fix any other time?

A. In the first, I'd say the second week in December, sometime in that --- the first and second week. ....." (801-802).

The trial court, over objections by the defense, then allowed the police undercover to testify to the illegal hearsay "conversation" between Barbarino and himself about which the trial court had previously instructed the prosecution witness (800-801):

> "Q. What did you say to Mr. Barbarino and what did he say to you?
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> The Witness: I told him that I expected much better quality on the two ounces that I had made and he said that he was surprised that the stuff wasn't as good as it was supposed to be and I told him that I didn't want to do business. I said I had nothing against Mr. Vidal or Mr. Russo, but I just didn't care to do business with them if they were going to give me one thing and tell me that it was of a higher quality and he said there was no problem, that he had known of many different people who could give me, you know, the same amount of stuff and maybe for a lesser price or more. He'd have people who had stuff that was very high and people high -- high in price and people who had stuff that was low in price, but it would be much lower in quality." (802-803).

The "conversation" was not merely illegal hearsay, but it allowed the prosecution to place before the jury the illegal, grossly unfair and prejudicial hearsay as a "fact" that the police undercover had "dealt" with the defendant Vidal which was a charge under counts 1, 2, 3, 4, 5 and 6 of the consolidated indictment, on November 8, and November 20, which the prosecution was required to prove by <u>legal</u> evidence beyond a reasonable doubt.

The trial court aided and counselled the prosecutor in the admission of People's Exhibit 6 (842-843), under Counts 7, 8 and 9, the alleged "cocaine sold" by Barbarino to the police undercover on December 27, 1973, as to which the police undercover testified that he did not observe the defendant Vidal to be present. The defense, on voir dire, elecited testimony from the undercover that he did not put the red identification markings on People's Exhibit 6 (842) and that he could not state that "this is the same plastic bag" upon which he had placed the identifying removable tape and that he couldn't identify the brown paper bag on PX 6 id as the brown paper bag he allegedly put a removable identifying tape (842). The trial court sustained defense objections to the admission of PX6 id (842). At that point, the trial court called counsel to the bench:

> "The Court: May I see counsel at the bench.
>
> Mr. Sutton: May we have a side bar on the record, Your Honor?
>
> The Court: Yes. Please excuse us.
>
> <u>Side Bar</u>:
>
> The Court: The reason I asked you to approach the bench is to tell you that you can ask him from today to tomorrow concerning the brown bag and the white plastic bag. I'm still not going to admit it into evidence. You have not connected it in any way to this defendant at this time. The others you have; they haven't been offered in evidence. This one you haven't and it's being offered in

evidence. I must sustain the objection. Up until now, there is absolutely no connection with anyone but Rosario Barbarino. Do you understand?

Mr. Sutton: May I respectfully object, Your Honor, to counselling of the prosecution.

Mr. Farkas: Your Honor, I object to that statement about 'counselling the prosecution'.

The Court: All right, let's proceed." (842-843).

The trial court also aided and counselled the prosecutor in front of the jury in getting People's Exhibit 1 for identification (Counts 1, 2 and 3 of the consolidated indictment) - alleged "cocaine" - (849-850) admitted into evidence after objection by the defense to its admission had been sustained by the trial court (849):

"Mr. Sutton: Your Honor, as of the moment, in the condition in which this is now, I respectfully object.

The Court: Sustained.

Mr. Farkas: I move to have it introduced subject to connection by testimony from the chemist, Your Honor.

The Court: May I remind you that all you did was show something to the witness who said he recognized it at this moment. If I understand correctly, that is.

Mr. Farkas: We (sic) did that yesterday.

The Court: No, we (sic) did not do it yesterday.

Mr. Farkas: I'll go over it." (849-850).

Thereafter, the prosecutor stated that he was offering the exhibit "subject to connection by testimony from the chemist..." (855). The trial court interrupted the prosecutor to instruct him that he didn't "need any connection; it's already been connected to the defendant. The only thing you have to do now is to establish what it is because if it's talcum powder, you don't have a case." (855):

"Mr. Farkas: Further, Your Honor, I, since we are having a side bar, in order to save time later on this morning, I am offering that piece into evidence under the following: I am offering it subject to connection by testimony from the chemist and ---

The Court: You don't need any connection; it's already been connected to the defendant. The only thing you have to do now is establish what it is because if it's talcum powder, you don't have a case." (855).

On a voire dire by the defense as to the prosecutor's offer of PX-1 id into evidence, the undercover police officer testified that he could not identify the white powder as that involved in the alleged November 8, 1973 transaction charged in the indictment (876). The prosecutor objected that the witness had "already stated that he cannot identify the powder itself" (876). The prosecutor then stated "And I will stipulate that you cannot identify that white powder" (876). The trial court counselled the prosecution:

"The Court: It's not necessary to volunteer any stipulations" (876). (Underscoring added).

The police undercover testified also that he could not identify the tinfoil of PX-1 id as the tinfoil he allegedly received on November 8, 1973 (877-878). The trial court sustained the defense objection to the admission of PX-1 id into evidence by the prosecution (878).

The prosecutor asked for a side bar (879). At the side bar the trial court aided and counselled the prosecutor as to what the police undercover is to testify to so that the critical exhibit, PX-1 id, as to Counts 1, 2 and 3 of the consolidated indictment, could be admitted into evidence for the prosecution:

> "The Court: I just think that, as a technical matter, at this time, there's insufficient proof to warrant its introduction (882)..... Wait a minute! He hasn't identified it. The only thing he's identified is that piece of tape. He hasn't goine further than that (882)... I think that you have failed to establish at this point, sufficient grounds to warrant its introduction in evidence (883).... If you're concerned about the exhibit because it is not now in evidence, I think I can make the statement that I am satisfied that it will ultimately be received in evidence...(883)... (Underscoring added).
>
> Mr. Farkas: Would you like me to continue on this line?
>
> The Court: If you think that it will be fruitful, yes. To my knowledge, the officer hasn't even stated, for example, that the amount of cocaine (sic!) visible is the approximate amount that he received and that's a white powder the same as what he received and that the tinfoil appears to be the same tinfoil that the white powder was wrapped in when he placed it in the envelope. (Underscoring added).

> Mr. Farkas: I'll start again.
>
> Mr. Sutton: May I speak, Your Honor?
>
> The Court: Yes.
>
> Mr. Sutton: I most respectfully object to Your Honor's instructions and counselling of the assistant district attorney in setting out the course of questions and the questions themselves to be asked, particularly since, in connection with the tin foil, this particular witness has already testified he could not recognize this particular tin foil as being the tin foil that he claims to have been involved in the transaction of November 8 and he's already testified as to the white powder and he's already testified specifically. He cannot say that that alleged white powder is the one that was involved in the November 8 transaction. Your Honor ---
>
> The Court: He can say ---
>
> Mr. Sutton: I haven't finished, Your Honor.
>
> The Court: I'm sorry.
>
> Mr. Sutton: Your Honor's instructions to the assistant district attorney and the opening of doors to the assistant district attorney to put additional questions which have already been precluded by prior testimony of this witness, I consider the most prejudicial, I consider as a grave error, Your Honor, and I would urge Your Honor not to permit this kind of thing to continue.
>
> The Court: To my knowledge, the witness was never asked whether these items are, in his opinion, what he received on November 8 during the course of the alleged transaction and I will permit questions along that line.
>
> Mr. Sutton: May I speak again, Your Honor?
>
> The Court: Yes, but try not to be repetitious.

Mr. Sutton: Well, I must repeat the point that I've made before---

The Court: Why must you repeat points that you've made before?

Mr. Sutton: So that the record is clear, Your Honor and that is that this witness has already testified---

Mr. Farkas: I object to the statement as having been stated on the record already, Your Honor.

Mr. Sutton: Counsel, I'm not a witness, Your Honor, and I think I have a right to speak to this point and you've given me the permission.

The Court: Speak!

Mr. Sutton: Thank you. This specific witness has already testified that he, looking at this tin foil, cannot say that it was the tin foil that was involved in the November 8 transaction.

The Court: I'm aware of that.

Mr. Sutton: And he has also said that looking at that white powder, he can't say that that white powder---

The Court: I'm aware of that also. He can say he believes it's the tin foil and the white powder which he received on that date.

Mr. Sutton: Well, my objection is very clear now, I think.

The Court: Yes.

The prosecutor, by improper, and illegal, leading questions over repeated objections by the defense, pursued the tactics and course which the trial court advised him to follow with the obvious assurance by the trial court that when he did so, the trial court would receive PX-1 id into evidence (887-889). The trial court then did in fact receive PX-1 id into evidence upon the testimony of the undercover police officer that "in his opinion" the white powder in PX-1 id is the white powder he received on November 8, 1973.

In the face of his prior testimony that he could not identify it or recognize it (876):

> "Q. ... And in your opinion, officer, is the substance that is described, that is shown on the outside of the envelope sealed by the outer plastic the same substance that you received on November 8, 1973 in the Buick Riviera driven by Vincent Vidal handed to you by Vincent Vidal?
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> The Witness: Yes, sir." (889).

The trial court, on another occasion, on its own, directed counsel to have a side bar on the admission of evidence against the defendant (940).

At the side bar the trial court counselled the prosecutor on a critical item of evidence and how to prose-

cute the case against the defendant and how to develop and establish evidence against the defendant (940-943). Defense counsel sensed that the reason for the side bar call by the trial court was to counsel the prosecutor (940). At the very outset of the side bar, defense counsel asked for permission to speak (940), and then directly urged the trial court "not to instruct the counsel for the prosecution on what to do and how to do it" (941). The prosecutor had moved to admit into evidence, a ladies'robe, PX-5 id (938), to which the defense objected and to which the trial court had twice previously sustained objection (831-832, 939). The ladies'robe was alleged by the prosecution to have been worn by defendant Vidal. The police undercover had testified that he did not see defendant Vidal but that he merely saw a "figure" wearing a robe. The trial court, on the prosecutor's second attempt to introduce the ladies' robe, PX-5 id into evidence, after sustaining the defense objection asked the prosecutor:

> "The Court: Sustained. What has changed since it was marked for identification?" (939).

The prosecutor then pursued more questions of the police undercover, which were insufficient to justify admitting the ladies' robe into evidence (939-940). The police undercover did not testify that the ladies' robe was found in the defendant's apartment (939-940). The police undercover testified:

> "Q. And when you were in there, did you enter the bedroom of the apartment?
>
> A. Yes.
>
> Mr. Sutton: Objection.
>
> The Court: Overruled.
>
> Q. And did you observe anything in the bedroom of that apartment?
>
> A. Yes.
>
> Q. What did you observe?
>
> A. A bed, a dresser.
>
> Q. I see. Anything else?
>
> A. No, sir." (940).

The prosecutor renewed his offer, the defense objected and the trial court called a side bar (940-941):

> "Mr. Farkas: Your Honor, at this time I renew my offer.
>
> Mr. Sutton: Objection, Your Honor.
>
> The Court: I think we'd better have a side bar. Please excuse us.
>
> Side Bar:
>
> Mr. Sutton: May I urge the court not to instruct the counsel for the prosecution on what to do and how to do it.
>
> .....
>
> The Court: All right, now, maybe I am mistaken but I have heard nothing with reference to this robe since it was marked for identification and since it was referred to as

being seen attached to an arm handing things out of a bedroom ..... When was it established that it's Vidal's apartment? I don't recall that. ..... There's been no testimony with reference to this robe being found in the apartment that I recall, has there?

Mr. Farkas: I thought there had been.

The Court: You thought there had been? Well, I don't think so.

Mr. Farkas: All right, we'll continue along the lines, sir. (Side bar concluded)." (940-943). (Underscoring added).

The prosecutor followed the counselling of the trial court and the trial court admitted the robe into evidence.

The prosecutor sought to introduce against the defendant Vidal, a tape recording of an alleged telephone conversation between the police undercover and Barbarino, People's Exhibit 7 for identification (945). Defense counsel objected (946) and the trial court sustained the objection (946). Later the prosecutor again offered that tape recording in evidence (982). Defense counsel objected (982). The trial court counselled the prosecutor as follows:

"The Court: I do not recall hearing a question put to this witness concerning other than that he recognizes it as a tape used on December 26 to phone Rosario and that it contains his voice and the voice of Rosario Barbarino and a female. I have heard no questions asked with respect to its accuracy as of yet.

Mr. Farkas: I'm about to.

The Court: All right, proceed.

Mr. Sutton: May we have a side bar, please.

The Court: No." (982-983). (Underscoring added).

The trial court blocked the defense from the opportunity to set forth his objection to the counselling.

The trial court counselled the prosecutor on another occasion so as to elicit testimony from Rosario Barbarino (and at the same time instructed Barbarino) as to the necessity to have Barbarino testify that he saw "whoever it was that knocked on the door" (1815). The witness however testified that he did not see who knocked on the door.

"Q. Now this person that knocked on the door the first time, did you later learn his name?

A. Yes.

Mr. Sutton: Objection.

The Court: I don't remember whether the testimony established whether the witness ever saw whoever it was that knocked on the door.

Mr. Farkas: I will ask this question. Did you see the person that knocked at the door the first time?

A. No." (1815). (Underscoring added).

Point XI

The trial court expressed opinions on the facts, directed findings of fact by the jury, unfairly marshaled the evidence, and denied the defendant a trial by jury and a fair trial.

During the course of the trial and in his charge to the jury the trial court expressed his opinion of the facts, directly and indirectly and made declarations of facts concerning disputed issues of material facts giving lip service to the defendant's fundamental rights of presumption of innocence and reasonable doubt. People v. Walker, 198 N.Y. 329 (1910); People v. Van Bramer, 235 A.D. 287, 257 N.Y.S. 99, aff'd. 261 N.Y. 505 (1932); People v. Ohanian, 245 N.Y. 2 (1927); People v. Kohn, 251 N.Y. 375, 379 (1929); McKenna v. People, 81 N.Y. 360 (1880); People v. McRae, 54 A.D. 2d 664, 388 N.Y.S. 2d 664 (1st Dept. 1976); People v. Davis, 353 A.D. 2d 870, 385 N.Y.S. 2d 345 (2d Dept. 1976); People v. Budd, 38 N.Y. 2d 988, 384 N.Y.S. 2d 435, 436 (1976).

After both sides had declared that they had no further questions of police chemist Acevedo who testified as to People's Exhibit 1, which was alleged cocaine on Counts 1, 2 and 3, and after the defense, on cross-examination had impeached that witness' testimony, and after that witness had

testified on cross-examination that he had no recollection of conducting any tests on that white powder in People's Exhibit 1, to wit:

> "Q. Do you have an independent recollection with respect to People's Exhibit 1 as to conducting any tests whatever on that white powder?
>
> A. No, sir; no recollection of this particular case, sir" (2832),

and other impeaching testimony, the trial court, by its unfair leading question, rehabilitated the witness, and expressed his own opinion that the white powder was "cocaine", and undermined and destroyed all the cross-examination that had occurred as if it had not happened:

> "By the Court:
>
> Q. Let me understand your testimony sir, so that there will be no mistake about it. Are you saying that the tests that you performed in the sequence that you performed them with respect to Exhibit 1, this is an absolute and complete and full indication that there is cocaine present in that white powder?
>
> A. That is correct.
>
> Q. Is there any question about it?
>
> A. No question about it, Your Honor." (2897).

Defense counsel objected (2897). However, the trial court did not strike out the questions and answers, and did not give any curative instructions to the jury (2897). The trial court's opinion that the white powder in PX-1 was

cocaine was clearly conveyed to the jury and left no room for jury deliberation on that vital issue.

In his charge to the jury, the trial court directed the jury concerning the evidence that prosecution witness, former co-defendant, and alleged accomplice Rosario Barbarino had been previously convicted of crime that

> "This evidence was solely to assist you in considering the credibility of the person giving the testimony and to determine the weight to be given to that testimony. You must not consider this evidence of the witness' prior conviction for any other purpose, or to permit it to otherwise influence you with respect to your verdict or determination. ..... It is your duty to determine whether this witness like any other witness is to be believed wholly, or partially or not at all. His prior conviction will not decide this for you...." (217-218). (Underscoring added).

The trial court after explaining the definition of possession charged the jury that

> "Now the People must also prove that the thing that the defendant so possessed was a controlled substance" (236).

The trial court thereupon declared to the jury that the item in evidence which the prosecution had offered as being from defendant's possession, was in fact from defendant's possession, and that the item was in fact cocaine, as follows:

> "You heard the officer's testimony that the item of property recovered from the defendant's alleged possession was submitted by him to the police laboratory and that it was analyzed there for the presence of cocaine. You also heard Eferan Acevedo testify that he was an employee of the police laboratory, that he examined the contents of the police property clerk's envelope with respect to this count and that he found that it contained cocaine. ...." (236).

The trial court thus charged and directed the jury to find those "facts". The trial court did not refer to the testimony on cross-examination which impeached each alleged "fact". The trial court did not marshal the evidence; he simply recited the "facts" which supported the prosecution's case, without referring to the counter-evidence disclosed by the cross-examination and by the glaring conflicts in testimoney between the prosecution witnesses and within each witness' own testimony.

The trial court declared to the jury that the testimony of each of the police chemists - he named them: "Acevedo, with respect to the alleged transaction of November 8th, Jeanne L. Farrar, with respect to the alleged transaction of November 20th, Igor Agatow, with respect to the alleged transaction of December 27th; and Thomas Castallano, with respect to the possession counts relating to the items allegedly found in the defendant's apartment on that same day, ... and his analysis of the substance offered in evidence (thus vouching the police chemists in fact had conducted analysis on each

substance offered in evidence, which was a matter highly in dispute) is that is known as expert testimony" (236). (Matter in parenthesis and underscoring added), and that each such police chemist was found by the trial as a matter of law "was an expert in his field of chemistry and drug analysis" (238).

The trial court thereupon instructed the jury that

> "The opinion stated by these experts from the witness stand was based on the particular facts as the expert himself observed them and recorded them." (238).

These statements directed the jury to make those findings notwithstanding that the trial evidence was contrary thereto, viz: Acevedo, on cross-examination as to Counts 1, 2 and 3, testified:

> "Q. Do you have an independent recollection with respect to People's Exhibit 1 as to conducting any tests whatever on this white powder?
>
> A. No." (2832).

Agatow testified that he had made no notes (2648) and that he had no recollection of conducting any tests on PX-6, as to Counts 7, 8 and 9 (2712); Catalano testified on cross-examination as to PX-20, Counts 10-15, that he had no independent recollection of having conducted any tests on any of the items alleged under Counts 10-15 (2990). Ferrar

testified on cross-examination that he made no notes whatever of any alleged analysis of PX-2, as to Counts 4, 5 and 6 (3165, 3154-3155). He also testified that his was a "re-analysis", and that he did not know what was originally in the evidence envelope (3145).

The trial court, having so declared his opinion, instructed the jury by an example not in the case, that they could reject the "expert's opinion.... for example if you learn that a chemist was bribed to make a false report" (238). The trial court effectively directed the jurors to accept his declaration of the "testimony" and "expertise" of the police chemists even though he stated that "his testimony is entitled to such as you find the expert's qualifications in his field warrant (238-239) since the trial court had previously ruled as a matter of law that "In this case the Court found as a matter of law that each of the chemists was an expert in his field of chemistry and drug analysis" (238).

The trial court directed the jury to find as a fact that the defendant - on each of the possession counts - possessed the drug unlawfully by his declaration as follows: "In this case you will note that there was no evidence that this defendant was entitled to possess any of the controlled substances involved in this case as a physician, patient, or otherwise" (240).

The trial court, as to Counts 4, 5 and 6, and as to Counts 7, 8 and 9, directed the jury to find as a fact that the substance was cocaine and that it weighed in excess of one ounce, to wit:

> "Now, you may recall the chemist Ferrar testified with respect to the November 20th transaction that he weighed the item which he found to be cocaine and that it weighed one and three quarter ounces and two grains. And you may further recall that Igor Agatow in testifying with respect to the substance which he examined also weighed it and that he found that it weighed one pound and one and three quarter ounces, plus four grains. Therefore, before the defendant could be convicted of either the sale relating to the -- the alleged sale relating to November 20th or the alleged sale relating to December 27th, in addition to the elements previously described, the People must have established that the cocaine was part of a mixture which weighed at least one ounce or more and that some part of it was cocaine..... It is sufficient that the aggregate weight of the substance was at least one ounce or more and contained some quantity of cocaine" (245-246). (Underscoring added).

The trial court also directed the jury to find as a fact that the items composing the possession counts under Counts 10 through 18 were all found in defendant's apartment (247):

> "Now, that therefore brings us to the remaining counts in the indictment, counts ten through eighteen. Each of those counts relates to what occurred on December 27th in the apartment after the police came in and after defendant Vidal was originally -- was arrested." (247). (Underscoring added).

The trial court directed the jury to find as a fact that the item at issue in Count 15 was marijuana, and that it was found in defendant's apartment (251) and that the item at issue in Count 10 was cocaine and it too was found in defendant's apartment (251), and that the cocaine so found weighed one and five eighth ounces plus nineteen grains (251):

> "And as you may recall that Thomas Catalano testified with respect to the marijuana allegedly found in the apartment, that he weighed it, and that it totalled ten and one-eighth ounces and eighteen grains.
>
> And while we are on that score, Catalano, you may recall, testified that he weighed the alleged cocaine found in the apartment and that the total weight was one and five-eighths ounces plus nineteen grains" (251).

The defense counsel duly excepted to the foregoing charges (261, 264-274). The trial court refused to charge further (261-274).

Point XII

> The prosecutor on summation violated defendant's right to a fair trial by his improper comments concerning defendant's failure to testify and by his improper comments concerning the defendant's failure to produce a witness to refute prosecution testimony.

One of the most vigorously contested issues was

whether the white powder offered into evidence by the prosecution was cocaine. There were ten (10) counts in the consolidated indictments which charged sale or possession of "cocaine". There were four (4) different alleged police chemists who gave testimony on that issue: Acevido, as to Counts 1, 2 and 3; Ferrar, as to Counts 4, 5 and 6; Agatow, as to Counts 7, 8 and 9; and Catalano, as to Count 10.

The defense conducted a cross-examination which impeached each one of the chemists on that issue.

On summation the prosecutor improperly commented concerning the failure of the defendant to produce a chemist witness as follows:

"Mr. Farkas: .... You also learned a lot about chemistry and when you leave here you will probably be able to tell your neighbors how to analyze drugs. But that isn't what this case is about either. Because if for a minute Mr. Sutton or Mr. Vidal---

Mr. Sutton: Objection. One minute.

The Court: Overruled.

Mr. Sutton: Your Honor---

The Court: Overruled. I don't want any speeches. Sit down.

Mr. Farkas: If for a minute there was any doubt whether this stuff is cocaine---

Mr. Sutton: Objection.

The Court: Overruled.

Mr. Farkas: He could have produced his own chemist.

Mr. Sutton: Objection.

The Court: With respect to that a defendant doesn't have to call any witnesses. Of course he can. In this case some witnesses were called by the defense, but members of the jury, the defense is under no obligation to produce or call any witnesses, if that's what he chooses to do. And the People must nevertheless establish the guilt of the defendant beyond a reasonable doubt. Proceed."

Mr. Sutton: Your Honor, I respectfully request a further instruction to the jury.

The Court: Request is denied.

Mr. Sutton: May I speak further?

The Court: No." (190-191).

The trial court's instruction to the jury was made belatedly and only after repeated objections by the defense and was inadequate to cure the wrong committed by the prosecutor (190-191). The trial court increased the prejudice to the defendant by the words he used, namely, that the defendant 'could produce witnesses and did produce some witnesses', but that the defense need not produce any witnesses

"if that's what it chooses to do." The trial court effectively shifted to defendant the burden to disprove the prosecution evidence if the defendant could.

The prosecutor even after the objections and aforesaid ruling by the trial court repeated his improper comments on defendant's failure to testify:

> "Mr. Farkas: ... I can't tell you what happened with Vincent Vidal, but Rosario Barbarino I was able to produce to you (196).... There is nothing at all that came from any item of evidence other than mere accusations and distortions from the defendant that in any way disprove any of this (203) .... And there is unchallenged evidence as to what this stuff is (205)." (Underscoring added).

The right to appellate review as to the latter comments is preserved, notwithstanding that defense did not specifically object thereto since the right involved is a fundamental constitutional right. People v. Patterson, 39 N.Y. 2d 288, 295-296, 383 N.Y.S. 2d 573 (1976).

The prosecutor's comments were improper and require a reversal of the judgment. People v. Mirenda, 23 N.Y. 2d 439, 457, 297 N.Y.S. 2d 532, 537 (1969). It cannot be said to be harmless beyond a reasonable doubt. People v. Crimmins, 36 N.Y. 2d 230, 367 N.Y.S. 2d 213 (1976).

Point XIII

> The trial transcript is incomplete in that a portion of the trial was not recorded by the court reporter and the trial court denied defendant's demand to direct the court reporter to record by stenographic notes that portion of the trial heard by the jury of two tape recordings between Barbarino and the police undercover.

The alleged tape recording of a telephone conversation between Barbarino and the police undercover allegedly on December 26, 1973 was critical, highly prejudicial, and utterly illegal hearsay evidence against the defendant. The defendant was not present and was not a party thereto. It was an important basis upon which the absence of defendant Vidal from the alleged "sale" by Barbarino to the police undercover was "explained" and was highly prejudicial to the defendant. The absence of any stenographic minutes and of a transcript of the illegal hearsay testimony by the tape recording, which was heard by the jury, and upon which the jury relied to render its verdict, was not available to the Appellate Division for review.

There was also no stenographic notes made and no transcripts were prepared of another tape recording of the illegal hearsay alleged conversation between Barbarino and the police undercover allegedly on December 27, 1973, which

allegedly recorded the "sale" transaction between Barbarino and the police undercover, which was the subject matter of Counts 7, 8 and 9 (1051-1052). This tape recording was played to the jury and was highly prejudicial to the defendant, and utterly illegal hearsay.

In each instance, the defense counsel duly demanded that the tape recordings which were played to the jury, be stenographically recorded and made part of the written record of the trial (989-990, 1051-1052). The trial court refused these demands in each instance (989-990; 1051-1052).

The trial transcript is incomplete.

This Court in People v. Giles, 152 N.Y. 136, 139 (1897) held that "the right to review upon the facts necessarily contemplates the preservation of the evidence."

This Court in People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323 (1958) held that:

> "Our State has always regarded the right to appellate review in criminal matters an integral part of our judicial system and treated it as such. .... It has been the consistent policy of our Courts to preserve and promote that right as an effective, if imperfect, safeguard against impropriety or error in the trial of causes. This policy has been particularly manifest on a number of occasions where the failure to provide sufficiently comprehensive reports of the proceedings at the initial stage of litigation threatened to render nugatory the right to appeal (cases cited). In the instances cited the lower courts had failed to make and preserve an adequate record of the proceedings at the trial level. Unequivocally and with emphasis on the importance and fundamental nature of the right to appellate review, the courts on each occasion held that the making of such a record and its availability to the defendant-appellant were absolute requisites and concomitants of the right to review...."

This Court in People v. Hall, 32 N.Y. 2d 546, 551, 347 N.Y.S. 2d 16, 20 (1973) stated that

> "There can be no doubt that a criminal appellant is entitled to a 'record of sufficient completeness' (CPL 460.70, subd. 3; Code Crim. Pro. Section 485; Mayer v. City of Chicago, 404 U.S. 189, 193-195, 92 S. Ct. 410, 30 L. Ed. 2d 372; People v. Pride, 3 N.Y. 2d 545, 549, 170 N.Y.S. 2d 321, 323, 147 N.E. 2d 719, 720."

The defendant has been denied his constitutional and statutory right to due process of law and to a fair and complete appellate review of the entire proceedings. People v. Adams, 22 A.D. 2d 892, 255 N.Y.S. 2d 339 (2d Dept. 1964).

The foregoing defect is in addition to the fact that the Appellate Division did not have before it on review the transcript of the trial which had been made. As heretofore noted, in the letter to this Court dated July 26, 1978, the record before the Appellate Division was incomplete in that some 1,500 pages of trial transcript were not forwarded by the appeals bureau to the Appellate Division. The defendant's right to have the Appellate Division review the appeal

on the merits, which could only be accomplished on the full transcript and record at trial, was denied. People v. Hall, 32 N.Y. 2d 546, 551 (1973); People v. Borum, 8 N.Y. 2d 177 (1960).

Point XIV

The trial court denied the defendant his Sixth Amendment right to a public trial by sealing the courtroom and excluding the public during the extensive testimony of police officer Florio without just cause and without any hearing.

The trial court, with no more than the bare application by the prosecutor and a brief conclusory recital by the prosecutor of the necessity for the relief, without any hearing, and over the objection of the defense, sealed the courtroom and excluded the public during the testimony of a principal witness, Police Officer Florio who had allegedly acted as a police undercover (732-733):

> "Mr. Farkas: ..... There is an application that I'm making at this time out of the presence of the jury and that is that since my first officer will be Police Officer Florio, I ask that the courtroom be sealed. The officer is an undercover police officer and there is several case law on the matter. He is active in investigations open at this time. He would work and does, in fact, work with confidential informants whose identity would be uncovered if

> his identity is known and, therefore, I ask that the courtroom be closed, sealed under the rule of People versus Hinton. I don't have the citation but I can get it.
>
> The Court: I'm familiar with the case. Do you wish to be heard?
>
> Mr. Sutton: Yes, I do. I respectfully object, Your Honor, and I state to Your Honor that the clearing of the courtroom and the absence of the people in the courtroom would end up as a signal to the jury that something is amiss and that the prejudice or the absence of the people in the courtroom would be reflected against the defendant. Additionally, I believe and I most respectfully urge to the Court that the defendant is entitled to a public trial in this particular instance and there is no valid reason why this police officer should not testify in open court if he's going to testify at all.
>
> The Court: The objection is overruled. The application is granted. You have an exception."

The sealing of the courtroom and the denial of a public trial to the defendant, denied defendant his constitutional rights to a public trial and to due process of law. People v. Hinton, 31 N.Y. 2d 71, 334 N.Y.S. 2d 885 (1972); People v. Morales, 53 A.D. 2d 517, 383 N.Y.S. 2d 620 (1st Dept. 1976); People v. Boyd, 59 A.D. 2d 558, 397 N.Y.S. 2d 150 (2d Dept. 1977).

Conclusion

The petition should
be granted.

Dated: February 25, 1979

Respectfully submitted,

Bernard G. Ehrlich
Charles Sutton
Attorney for Petitioner
299 Broadway
New York, New York 10007
212-964-8612

APPENDIX

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 21, 1978

HON. JAMES D. HOPKINS, Justice Presiding
HON. JOSEPH A. SUOZZI,
HON. SAMUEL RABIN,
HON. J. IRWIN SHAPIRO, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Vincent Vidal,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Vincent Vidal,

defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered January 22, 1975, convicting him inter alia of various narcotics offenses, upon a jury verdict, and imposing sentence;

and the said appeal having been submitted by Charles Sutton, Esq., of counsel for the appellant, and submitted by Laurie Stein Hershey, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion & decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, on the law, by reversing the conviction of criminal possession of a controlled substance in the third degree (count two of the consolidated indictment), and the sentence imposed thereon, and the said count is dismissed; and, as so modified, the judgment is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

B/ms

_____ AD2d _____ . S - February 6, 1978

2535 E/77

The People, etc., respondent,
v. Vincent Vidal, appellant.

Charles Sutton, New York, N.Y., for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Laurie Stein Hershey of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County (KREINDLER, J.), rendered January 22, 1975, convicting him inter alia of various narcotics offenses, upon a jury verdict, and imposing sentence.

Judgment modified, on the law, by reversing the conviction of criminal possession of a controlled substance in the third degree (count two of the consolidated indictment), and the sentence imposed thereon, and the said count is dismissed. As so modified, judgment affirmed.

The second count of the consolidated indictment is a lesser included offense of the first count thereof. The evidence does not support a finding of possession, as alleged in the second count, independent of the sale, as alleged in the first count. The other contentions raised by defendant have been considered and found to be without merit.

HOPKINS, J.P., SUOZZI, RABIN and SHAPIRO, JJ., concur.

#2290 s

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 26, 1978.

HON. JAMES D. HOPKINS, Justice Presiding
HON. JOSEPH A. SUOZZI
HON. SAMUEL RABIN
HON. J. IRWIN SHAPIRO
Associate Justices

The People, etc.,

Respondent,

v.

Vincent Vidal,

Appellant.

In the above entitled cause, the appellant having moved (1) for reargument of the appeal from a judgment of the Supreme Court, Kings County, rendered January 22, 1975, which was modified by order of this court dated February 21, 1978, and (2) to restore the appeal to the calendar for oral argument;

Now, upon the papers filed in support of the motion and there being no papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the said motion is hereby denied.

Enter: IRVING N. SELKIN

Clerk of Appellate Division

State of New York
Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

VINCENT VIDAL

CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
November 27, 1978

Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order, App. Div., 2nd Dept dated February 21, 1978 modifying judgment of Supreme Kings County rendered January 22, 1975

The Constitutional provisions involved in this case are:

(a) *Fifth Amendment:* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ." U.S.C.A. Const. Amend. 5.

(b) *Sixth Amendment:* "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the assistance of Counsel for his defense." U.S.C.A. Const. Amend. 6.

(c) *Fourth Amendment:* "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York Criminal Procedure Law :
11A McKinney's , Part 2

§ 450.10. Appeal by defendant to intermediate appellate court; in what cases authorized as of right

An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;

2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;

3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People.

L.1970, c. 996, § 1; amended L.1971, c. 671, § 1; L.1971, c. 788, § 3, all eff. Sept. 1, 1971.

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§ 460.70 Appeal; how perfected

1. Except as provided in subdivision two, the mode of and time for perfecting an appeal which has been taken to an intermediate appellate court from a judgment, sentence or order of a criminal court are determined by rules of the appellate division of the department in which such appellate court is located. Among the matters to be determined by such court rules are the times when the appeal must be noticed for and brought to argument, the content and form of the records and briefs to be served and filed, and the time when such records and briefs must be served and filed.

When an appeal is taken by a defendant pursuant to section 450.10, two transcripts shall be prepared and settled, one of which shall be filed with the criminal court by the court reporter, except that where the defendant is granted permission to proceed as a poor person by the appellate court, the court reporter shall promptly make and file with the criminal court two transcripts of the stenographic minutes of such proceedings as the appellate court shall direct. The expense of transcripts prepared for poor persons under this section shall be a state charge payable out of funds appropriated to the office of court administration for that purpose. The appellate court may where such is necessary for perfection of the appeal, order that the criminal court furnish one of such transcripts to the defendant or his counsel.

Supplement Page 94

§ 470.05 Determination of appeals; general criteria

1. An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties.

2. For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

Pages 442,443

§ 470.15 Determination of appeals by intermediate appellate courts; scope of review

1. Upon an appeal to an intermediate appellate court from a judgment, sentence or order of a criminal court, such intermediate appellate court may consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant.

2. Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following:

(a) Upon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense;

(b) Upon a determination that the trial evidence is not legally sufficient to establish the defendant's guilt of all the offenses of which he was convicted but is legally sufficient to establish his guilt of one or more of such offenses, the court may modify the judgment by reversing it with respect to the unsupported counts and otherwise affirming it;

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made:

(a) Upon the law; or

(b) Upon the facts; or

(c) As a matter of discretion in the interest of justice; or

(d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c).

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Section 470.15 (cntd)

4. The kinds of determinations of reversal or modification deemed to be upon the law include, but are not limited to, the following:

(a) That a ruling or instruction of the court, duly protested by the defendant, as prescribed in subdivision two of section 470.05, at a trial resulting in a judgment, deprived the defendant of a fair trial;

(b) That evidence adduced at a trial resulting in a judgment was not legally sufficient to establish the defendant's guilt of an offense of which he was convicted;

(c) That a sentence was unauthorized, illegally imposed or otherwise invalid as a matter of law.

5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.

6. The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:

(a) That an error or defect occurring at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in subdivision two of section 470.05 so as to present a question of law, deprived the defendant of a fair trial;

(b) That a sentence, though legal, was unduly harsh or severe.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

§ 470.20 Determination of appeals by intermediate appellate courts; corrective action upon reversal or modification

Upon reversing or modifying a judgment, sentence or order of a criminal court, an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or directed is governed in part by the following rules:

1. Upon a reversal of a judgment after trial for error or defect which resulted in prejudice to the defendant or deprived him of a fair trial, the court must, whether such reversal be on the law or as a matter of discretion in the interest of justice, order a new trial of the accusatory instrument and remit the case to the criminal court for such action.

2. Upon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument.

3. Upon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the offenses of which the defendant was convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment. In such case, it must either reduce the total sentence to that imposed by the criminal court upon the counts with respect to which the judgment is affirmed or remit the case to the criminal court for re-sentence upon such counts; provided that nothing contained in this paragraph precludes further sentence reduction in the exercise of the appellate court's discretion pursuant to subdivision six.

4. Upon a modification of a judgment after trial which reduces a conviction of a crime to one for a lesser included offense,

the court must remit the case to the criminal court with a direction that the latter sentence the defendant accordingly.

5. Upon a reversal or modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, the court must dismiss the accusatory instrument or any reversed count.

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe, the court must itself impose some legally authorized lesser sentence.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

New York Criminal Procedure Law

§ 470.50 Reargument of appeal; motion and criteria for

1. After its determination of an appeal taken pursuant to article four hundred fifty,[1] an appellate court, in the interest of justice and for good cause shown, may in its discretion, upon motion of a party adversely affected by its determination, or upon its own motion, order a reargument or reconsideration of the

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§ 470.50 CRIMINAL PROCEDURE LAW Part 2

appeal. Upon such an order the court may either direct further oral argument by the parties or confine its reconsideration to re-examination of the issues as previously argued or submitted upon the appeal proper. Upon ordering a reargument or reconsideration of an appeal, the court must again determine the appeal pursuant to the provisions of this article.

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mc

No. [illegible]

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 23, 1975.

HON. FRANK A. GULOTTA, Presiding Justice
HON. SAMUEL RABIN)
HON. JAMES D. HOPKINS) Associate Justices
HON. M. HENRY MARTUSCELLO)
HON. HENRY J. LATHAM)

The People of the State of New York, Respondent, v. [illegible] Appellant.	Decision and Order - Motion to Dispense with Printing - Appeal from Judgment

In the above-entitled action, the above-named appellant (defendant) having appealed to this court from a judgment of the [illegible] Court, KINGS County, rendered JANUARY 22, 1975 and appellant having moved to dispense with printing;

Now, upon the papers filed in support of the motion and papers filed in opposition or relating thereto; and the motion having been duly submitted and due deliberation having been had thereon; it is

ORDERED that the motion is hereby granted.

The appeal will be heard on the original papers (including a typewritten certified transcript of the stenographic minutes) and on appellant's and respondent's briefs, which may be in legible typewritten form or in any other legible form authorized by this court's rules and which must comply with said rules (22A NYCRR 670.1 et seq.).

The parties are directed to file eight copies of their respective briefs and to serve one copy on each other.

Pursuant to statute (CPL 460.70), within the twenty-day period prescribed therein, the stenographer of the trial court is required to make, certify and file two typewritten transcripts of the stenographic minutes of the proceedings of the hearing trial and sentence and the clerk of the trial court shall furnish one of such certified transcripts to appellant, without charge.

Appellant's time to perfect the appeal is enlarged to the November term, which begins November 10, 1975 ; appeal ordered on the calendar for said term; appellant's brief must be served and filed on or before September 19, 1975 and respondent's brief must be served and filed on or before October 17, 1975.

Enter:

Defendant's address:
c/o [illegible]

IRVING N. SELKIN
Clerk of the Appellate Division
DATE: 6/23/75 No. 2559

To be Argued by:
Charles Sutton, Esq.
30 minutes

SUPREME COURT : APPELLATE DIVISION
SECOND DEPARTMENT

- - - - - - - - - - - - - - - - - - - -X

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

v. :

VINCENT VIDAL, :

Defendant-Appellant. :

- - - - - - - - - - - - - - - - - - - -X

APPELLANT'S BRIEF

Charles Sutton
Attorney for Appellant
299 Broadway
New York, New York 10007
212-964-8612

Hon. Eugene R. Gold
District Attorney, Kings County
Municipal Building
Brooklyn, New York
212-643-5100
Indictment Nos.: 7824/73
7826/73

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QUESTIONS

1. Was the evidence insufficient to sustain the conviction of the defendant under each count of the indictment respectively?

2. Was the defendant denied his Constitutional rights to due process of law and equal protection of the laws by the knowing use of false evidence by the prosecution?

3. Was the defendant denied his Constitutional rights to a fair trial by the conduct of the trial court?

4. Was the defendant denied his Constitutional rights to a fair trial by the conduct of the prosecutor?

5. Was the defendant denied his Constitutional rights by the unlawful search and seizure of the defendant and of his apartment on December 27, 1973?

a. Was the warrantless entry of the police by force into the building where defendant resided illegal?

b. Was that warrantless entry by force into the defendant's (1) building and (2) apartment without announcement of purpose and authority illegal?

c. Was the warrantless entry into the defendant's apartment illegal?

d. Was the warrantless search and seizure of the defendant and of his apartment illegal?

e. Was the warrantless arrest of the defendant illegal?

f. Was the subsequent warrant issued upon probable cause?

g. Was the warrant invalid?

h. Was the alleged warrant search and seizure illegal?

6. Was the defendant denied his Constitutional rights to due process of law and equal protection of the laws being tried for "conspiracy" and "acting in concert" allegedly with Rosario

Barbarino in the absence of any such allegations and charges in the indictments?

7. Was the defendant denied his constitutional rights to due process and equal protection of the laws by the introduction of illegal, hearsay evidence of "conspiracy" and "acting in concert" as aforesaid?

8. Was the defendant denied his constitutional rights to due process of law and equal protection of the laws by the egregious allowance of illegal leading questions and hearsay to convict the defendant?

9. Was the defendant denied his constitutional rights under the Fourteenth Amendment by the consolidation and amendment of indictments 7824/73 and 7826/73?